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Nos. 90-1657

In the
Supreme Court of the United States.

October Term, 1991

COMMONWEALTH OF MASSACHUSETTS
SEACOAST ANTI POLLUTION LEAGUE,
NEW ENGLAND COALITION ON
NUCLEAR POLLUTION
Petitioners,

v.

NUCLEAR REGULATORY COMMISSION, et al.
Respondents.

Petitioners' Reply To Briefs In Opposition

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TABLE OF AUTHORITIES

FEDERAL CASES

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EEOC v. Shell Oil Co. . . . . .4 466 U.S. 54, 67 (1984)

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The Commonwealth of Massachusetts, Seacoast Anti Pollution League, and New England Coalition on Nuclear Pollution ("Petitioners") reply to the Brief For The Federal Respondents In Opposition submitted by the United States and the Nuclear Regulatory Commission (collectively, "Respondents" or "NRC") and to the Brief In Opposition Of Respondent, Public Service Company of New Hampshire ("PSC").

1. In its response, the NRC artfully avoids addressing Petitioners' fundamental contention that the agency violated its 1980 emergency planning rule by authorizing Seabrook to operate at full power and by declaring that any proposed nuclear power plant in this country may operate in the complete absence of a site-specific judgment that

the emergency plans will effectively protect the public in a radiological emergency. Instead, Respondents offer an alternative question which focuses solely upon the NRC's evidentiary ruling that excluded Petitioners' testimony of radiation dose consequences under certain accident scenarios. Respondents' Brief at I. The NRC's failure to consider Petitioners' particular dose consequence evidence, however, is only a compelling symptom of the NRC's more fundamental infirmity: the failure to comply with its 1980 emergency planning rule. 10 C.F.R.50.47(a)(1). In contradiction of that rule, the NRC has never determined whether emergency planning for Seabrook will in fact protect the public; and the agency no longer intends to conduct such

a site-specific review for other nuclear power plants. Respondents' Brief at 3 and n.1 (emergency plans need only comply with generic standards). Therefore, the decision by this Court to grant certiorari is of significant national importance in order to prevent any future reactors from proceeding to full power in the absence of a determination that the emergency plans will actually work. Petition at 32.[1/]

1/ Cf. SAPL v. NRC, 690 F.2d 1025 (D.C. Cir. 1982). The Court of Appeals permitted the NRC, during its construction permit proceedings for Seabrook, to defer consideration of the site-specific public risk factors only because the agency represented that these concerns would be fully addressed during the full power licensing proceedings. "These factors include the population density around the Seabrook site, the feasibility of developing a notification system for the Seabrook EPZ, estimates of evacuation times for the Seabrook EPZ, and the availability of a full review of these factors at the

(footnote continued)

2. Citing discussion by the Court of Appeals interpreting the regulatory scheme for licensing, Respondents state that the NRC's new generic rule "is a reasonable approach to planning for emergencies. . ." Respondents' Brief at 8. Even assuming that the NRC originally had discretion to adopt a generic licensing scheme, the agency did not have discretion in 1990 to overturn in effect its 1980 regulation requiring a site-specific review of plan effectiveness. Petition at 31-32; EEOC v. Shell Oil Co., 466 U.S. 54, 67 (1984), citing United States v. Nixon, 418 U.S. 683, 695-696 (1974). This

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(footnote continued)
operating license stage." SAPL at 1032 (emphasis added). Not only does the NRC's new generic rule totally ignore all of these specific risk factors as part of the licensing decision, but Respondents do not even refer to the SAPL case in their brief.

"reasonable approach" to emergency plan approval upheld by the Court of Appeals now provides that defects in emergency planning, no matter how great a threat to public safety, can never be an "operating license blocker." App. Vol. I at 88-89, 924 F.2d at 330; PSC Brief at 4. This approach clearly contradicts the NRC's intent when it enacted the emergency planning rule in 1980, following the accident at Three Mile Island, in response to a Congressional mandate. App. Vol. II at 158 (1980 Authorization Act); App. Vol. III at 43-44, 49-50, 54 (rulemaking transcript); SAPL at 1030 ("if . . . the infeasibility of EPZ evacuation renders it impossible for PSC to provide the requisite 'reasonable assurance,' the

operating license will not be granted".)[2/]

3. Respondents contend that the NRC's new emergency planning rule is entitled to substantial deference because of "the consistency of the NRC's construction of its rule with other prior decisions and pronouncements." Respondents' Brief at 7. Respondents, however, cannot and do not cite a single line, in more than one hundred pages of the 1980 official rulemaking transcript, App. Vol. III, or in any NRC pronouncement over the ten years following that rulemaking, stating that

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2/ PSC suggests that a rule waiver could protect the public by providing heightened scrutiny for particular planning problems. PSC Brief at 7. It is of little comfort to the public to review site specific risk factors through a rule waiver when, in the end, even significant and unresolved threats to public safety will not prevent licensing. See also Petition at 32, n.7.

compliance with the generic "b standards", in and of itself, is sufficient to demonstrate the "adequate protective measures" mandated by 10 C.F.R. §50.47 (a)(1).[3/]

Indeed, the official rulemaking transcript is replete with discussion by the Commissioners that approvable emergency plans must actually protect the public in light of site-specific factors. Petition at 16-17.[4/] The NRC

3/ The two quotations cited by Respondents are unavailing. Respondents' Brief at 7. The first merely states the truism that emergency plans must have "flexibility," while the second, issued by new Commission personnel in 1987, says nothing about the intent of the rule when enacted in 1980. Apparently these citations are the best Respondents can offer to show prior "consistency" with the Commission's new generic rule announced in 1990. Yet even these citations do not mention the "b standards."

4/ These factors include weather, App. Vol. III at 43, 54; crowds of evacuees, Id. at 49; heavily populated areas, Id.

(footnote continued)

confirmed this position in this very case in 1982, Petition at 19 citing SAPL, and again in 1987, when the NRC's own expert agency on off-site emergency planning, FEMA, correctly interpreted the regulatory scheme to conclude that Seabrook should not operate because the emergency plans were ineffective and thousands of people likely would die or suffer injury in a nuclear accident. Petition at 13, 20-21.

(footnote continued)

at 59; "normal warning times," Id. at 54; or otherwise "what you would expect to prevail during normal or even somewhat less that normal conditions" at the site, Id. at 73. Conspicuously, PSC never mentions the rulemaking transcript. The NRC, in defending its generic rule, merely offers limited citation for the unremarkable proposition that emergency plans need not assure a level of zero risk to the public. Respondents' Brief at 6, n.3. In response to the NRC's additional suggestion of ambiguity in the rulemaking transcript, Petititioners simply urge the Court to review the document. App. Vol. III.

The Court of Appeals, therefore, erred by giving undue deference to the NRC's new position, which contradicts the agency's longstanding rule that, as a condition of licensing, emergency plans must actually work in light of the specific risk factors at a site. Petition at 33 and cases cited there.

4. PSC claims that the question presented is "whether Petitioners' methodology for determining [emergency plan] adequacy should be followed as opposed to that selected by the NRC." PSC Brief at 5. This is a mischaracterization of Petitioners' position and serves only to distort the real issue presented herein. Contrary to the misstatement of PSC, the issue here is whether the NRC has violated its own 1980 emergency planning rule.

PSC then seizes upon an argument that it did not raise in the Court of Appeals and that the NRC itself has declined to adopt before this Court. PSC alleges that Petitioners did not appeal a decision by the NRC Appeal Board that is necessary for Court review. PSC Brief at 4-5. Without question, the Court of Appeals found sufficient "finality" for the present appeal with respect to the NRC's immediate effectiveness decision, which allowed start-up of the reactor pending completion of intra-agency appellate review of certain remaining issues raised in the Seabrook litigation. App. Vol. I at 46; 924 F.2d at 322. The Court also ruled that, because the NRC's decision to exclude Petitioners' dose consequence evidence and by implication

all site-specific risk factors as irrelevant to licensing was so linked to the start-up decision, that ruling is also appealable. App. Vol. I at 48-49, 924 F.2d at 323. No other NRC decisions on Seabrook, including the one cited by PSC, are appealable at this time. App. Vol. I at 46, 924 F.2d at 322. Nor need they be. The NRC has finally articulated its erroneous standard for emergency plan approval and, based on that standard, has authorized full power operation at Seabrook. The issues raised by Petitioners, therefore, are now properly before this Court for review. Id.

5. PSC argues that the emergency planning standard is not a significant issue since Seabrook is the last plant "in the NRC pipeline that raises

substantial emergency planning issues." PSC Brief at 6. This is little comfort to the tens of thousands on the Seabrook beaches. Nor does the NRC, which is advocating for a new generation of reactors, offer any support for PSC's speculative claim that no future reactor will pose significant emergency planning problems.[5/]

5/ The NRC also will soon consider applications for relicensing aging nuclear plants. Whether these facilities may be subject to the NRC's current safety standards, including emergency planning, remains unclear at this time.

Conclusion

Petititioners respectfully request that their petition for a writ of certiorari be granted.

Respectfully submitted,

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